115-45

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 222.

GWILLIM R. GWILLIM, PLAINTIFF IN ERROR,

vs.

JOHN F. DONNELLAN AND WILLIAM R. EVERETT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED JUNE 7, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered, that heretofore and on, to wit, the 7th day of July, A. D. 1881, came Gwillim R. Gwillim, by Messrs. Wells, Smith and Macon, his attorneys, and filed in said court and in said cause his complaint in ejectment against John T. Donnellan and William R. Everett. And the said complaint is in words and figures as follows, to wit:

Complaint.

THE UNITED STATES OF AMERICA,
District of Colorado.

In the Circuit Court.

GWILLIM R. GWILLIM, Plaintiff,
vs.
JOHN T. DONNELLAN, WILLIAM R. EVERETT, Defendants.

Isaac Thomas impleaded the above-named defendants in the district court in and for the county of Arapahoe, and State of Colorado, and in the first cause of action in his complaint in that cause, demanded the same lands and premises hereinafter mentioned.

And in his second cause of action in said complaint the said Isaac demanded equitable relief in respect thereof.

2 Afterwards the said Isaac conveyed the said premises, damages, and costs to the said Gwillim R. Gwillim, whereupon, upon his petition, the said Gwillim was substituted as plaintiff in said cause in the lieu and stead of said Isaac, and the said cause was removed into the said circuit court.

Afterwards, by the order of the said circuit court, it was directed that the transcript in that cause, transmitted from the said district court to the said circuit court, should be filed on the equity side of said court, and that the said plaintiff should further prosecute the first cause of action in the said complaint on the law side of the said circuit court, and that the parties replead as to the said cause of action, and the-upon, in lieu of the first cause, the said afore-mentioned complaint contained, the said Gwillim R. Gwillim complains and says:

That plaintiff, at the date of the institution of the said suit, was, and still is, a subject of Victoria, Queen of Great Britain and Ireland.

That the defendants and each of them at the same date were, and they and each of them still are, citizens of the State of Colorado.

That the matter in controversy in this suit exceeds the sum or value of five thousand dollars. That heretofore to wit, on the —— day of ——, A. D. 1881, the plaintiff was possessed of those certain mining premises called the Cambrian Lode, situate in

3 Upper San Miguel Mining District, in the county of Ouray, and State of Colorado, being 1,500 feet in length along the vein of said lode, with surface ground three hundred (300) feet in width,

150 feet on each side of the center of the vein of said lode, adjoining the Sheridan lode, on the north end thereof, more particularly bounded and described as follows, to wit: Beginning at corner No. 1, whence locating monument No. 3 is S. 19° 15′ E. 6,217.5 feet; thence N. 20° W., 1,500 feet, to cor. No. 2; thence S. 70° W., 300 feet, to corner No. 3; thence S. 20° E., 1,500 feet, to cor. No. 4; thence N. 70° E., 300 feet, to corner No. 1, the place of beginning; to which said premises, and the possession thereof, the plaintiff then was and is entitled by right of actual prior location thereof as a mining claim in the public domain of the United States, in compliance, in all respects, with the laws of the United States, and of the State of Colorado and of said district, and by virtue of the actual prior possession of said premises.

And the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the same day aforesaid, wrongfully ousted the plaintiff therefrom, and broke, took, and carried away therefrom large quantities of the ore of said mine, of the value of fifty thousand dollars, and now wrongfully withhold the possession of the said premises from the plaintiff, to his damage in $50,000.

That afterwards, to wit, on the same day and year afore-
4 said, the said defendants, wrongfully pretending to be the owners of said premises, made in the Land Office of the United States an application for patent thereof under the name of the Mendota Lode, and this action is brought to sustain an adverse claim interposed against said application.

Wherefore plaintiff prays judgment for possession of the said premises, and for his damages fifty thousand dollars and his costs.

(Signed) WELLS, SMITH, & MACON,
Pl'ff's Att'ys.

(Endorsed:) U. S. C. C. Gwillim R. Gwillim *vs.* John T. Donnellan [and] William R. Everett. Complaint. Filed Jul- 7, 1881. (S'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 8th day of July, A. D. 1881, the same being one of the regular judicial days of the May term, A. D. 1881, of said court, present the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order to Plead in 15 *Days.*

For Possession of Specific Real Property and for Damages.

GWILLIM R. GWILLIM
vs.
JOHN T. DONNELLAN and WILLIAM R EVERETT.

5 At this day comes the said plaintiff, by E. T. Wells, Esq., his attorney, and on his motion it is ordered by the court that the said defendants answer herein within fifteen (15) days from this day.

And afterwards and on, to wit, the 20th day of July, A. D. 1881,

the same being one of the regular judicial days of the May term, A. D. 1881, of said court, present the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order to Plead in 20 Days.

For Possession of Specific Real Property, etc.

GWILLIM R. GWILLIM
vs.
JOHN T. DONNELLAN and WILLIAM R. EVERETT.

At this day comes the said plaintiff, by E. T. Wells, Esq., his attorney, and on his motion it is ordered that the said defendants demur or answer herein within twenty (20) days from this day.

And afterwards and on, to wit, the 12th day of August, A. D. 1881, came the said defendants, by Charles H. Toll, Esq., their attorney, and filed in said court and in said cause their demurrer to the complaint heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

6 *Demurrer.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court.

GWILLIM R. GWILLIM, Plaintiff,
vs.
JOHN T. DONNELLAN and WILLIAM R. EVERETT, Defendants. } Law.

The defendants demur to plaintiff's complaint on the following grounds:

First. That this court has no jurisdiction of the subject of the action, for the reason that this action is brought in support of an adverse claim to an application by the defendants for a United States patent for a mining claim, situate within the county of Ouray and State of Colorado, and for the recovery of real property and the determination of a right and interest in such property, which real property is situate within said Ouray county, and no part of which is situate within the county of Arapahoe, or the second judicial district of the State of Colorado, in the district court of which Arapahoe county and second judicial district this action was originally brought, and from which court this action, as appears by the complaint, has been removed into this court by the plaintiff.

Second. That the plaintiff has no legal capacity to sue, for the reason that he is an alien and subject to Victoria, Queen of
7 Great Britain and Ireland, and not a citizen of the United States, and that this suit is brought in support of an adverse claim to an application by the defendants for an United States patent for a mining claim, and for the recovery of a mining claim in the public domain of the United States, and for the recovery of the possession of such mining claim and for damages by the defendant to

such mining claim, which mining claim, and the possession thereof, is claimed by the said alien plaintiff, by virtue of the actual prior location thereof, as a mining claim in the public domain of the United States, in compliance, in all respects, with the laws of the United States and the State of Colorado and the mining district within which the same is situate, and by virtue of the actual prior possession of said premises and by virtue of the conveyance of said premises to said plaintiff, and for which premises and mining claim the defendants have made an application in the United States Land Office for a patent therefor, under the name of the Mendota lode.

Third. That the complaint is ambiguous, unintelligible, and uncertain, for the reason that it does not sufficiently describe and identify the premises, the recovery of which is sought, and that it does not specify the time when the defendants ousted the plaintiffs from the premises in the said complaint described, and that
8 it does not appear for what damages the plaintiff demands judgment.

Fourth. That the complaint does not state facts sufficient to constitute a cause of action, for the reason that it does not allege facts sufficient to constitute or establish plaintiff's title or right of possession to the premises in said complaint described.

(Signed) WM. STORY &
CHARLES H. TOLL,
Defts' Att'ys.

Endorsed: 743. In the U. S. circuit court. Gwilliam R. Gwillim *vs.* John T. Donnellan *et al.* Demurrer to pl'ff's complaint. Wm. Story & Chas. H. Tall, def'ts' att'ys. Filed Aug. 12, 1881. (S'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 3d day of September, A. D. 1881, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their answer to the complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

Answer.

THE UNITED STATES OF AMERICA, *District of Colorado:*

9 In the Circuit Court.

GWILLIM R. GWILLLIM, Plaintiff,
vs.
JOHN T. DONNELLAN and WILLIAM R. EVERETT, Defendants. } At Law.

Answering the complaint of the plaintiff herein, the above-named defendants, Donnellan and Everett, for answer thereto, say:

First. That as to whether Isaac Thomas, in said complaint mentioned as the plaintiff's grantor, conveyed to the plaintiff the premises, damages, and costs in said complaint mentioned and described, these defendants have no knowledge or information sufficient to form a belief, and they therefore deny the same.

Second. They deny that on the —— day of ——, A. D. 1881, or at any time prior to the commencement of this action or heretofore, the plaintiff was or has been possessed of or in any manner entitled to the possession of the lands and premises described in plaintiff's complaint, or any part thereof, either by right of actual prior location thereof as a mining claim or by virtue of the actual or constructive prior possession of said premises or any part thereof, and these defendants deny that at any time they wrongfull or otherwise ousted the plaintiff from said premises or any part
10 thereof; and they deny that they took and carried away therefrom large quantities of ore of the value of $50,000 or any other sum.

Third. And for a further answer and defense to the plaintiff's complaint these defendants show to this court that on the 19th day of November, A. D. 1878, these defendants were, and ever since have been and are now, the actual owners, occupants, and possessors, and in actual occupation of the Mendota lode mining claim, fifteen hundred feet in length by three hundred feet in width, situate in the Ansborough basin, in the Upper San Miguel Mining District, county of Ouray, and State of Colorado.

Fourth. That these defendants claim the right to occupy and possess said premises by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of the State of Colorado, and by actual prior location and possession of the same as a lode-mining claim on the vacant public domain and mineral-bearing lands of the United States.

Fifth. That on the 19th day of November, A. D. 1878, the premises herein described being vacant and unoccupied mineral land of the United States, these defendants then and now being citizens of the United States over twenty-one years of age, went upon the same and discovered and located the same as the Mendota Lode mining claim; that said lode was duly located according to the rules and regulations of the said Upper San Miguel Mining District
11 and the laws of the United States and the State of Colorado, and that the location certificate of said load was duly recorded in the office of the county clerk of said county on the 26th day of December, A. D. 1878; and that these defendants have in all things relating to the location and recording occupation and possession of said premises, complied with each and every requirement and condition of the rules and regulation of such district and the laws of the United States and State of Colorado relating thereto.

Sixth. That afterwards and on the 28th day of July, A. D. 1880, these defendants filed in the office of the county clerk of said county their amended certificate of location of said Mendota lode, which said amended certificate of location, as is therein recited, was filed to more exactly define the boundaries of said Mendota lode, and did so describe the boundaries of said Mendota lode by giving its meets and bounds. And these defendants state and allege to this court that the premises embraced within and constituting the said Mendota lode mining claim, situate in Ansborough basin, in the mining

district, county and State aforesaid, are particularly described as follows, to wit: Beginning at corner No. 1, whence locating monument No. 3 is, S. 19° 51′ E. 6,201 ft.; thence running N. 20° W. 1,500feet to corner No. 2; thence running S. 70° W. 300 ft. to corner No. 3, whence Mt. Sneffles is N. 15° W.; thence running S. 20 E. 1,500 ft. to corner No. 4; thence N. 70° E. 300 ft. to corner No. 1, the
12 place of beginning. That the said described Mendota lode mining claim and premises embraces the same premises described in plaintiffs' complaint.

Wherefore these defendants ask judgment herein, together with their costs.

(Signed) EDWARD O. WOLCOTT,
WILLIAM STORY,
CHARLES H. TOLL,
Def'ts' Att'ys, Denver.

STATE OF COLORADO, }
County of Arapahoe, } *ss.*:

John T. Donnallan, being first duly sworn upon his oath, deposes and says: That he is one of the defendants named in the above-entitled action; that he has read the foreging answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) J. T. DONNELLAN.

Subscribed and sworn to before me, this third day of September, A. D. 1881.

[SEAL.] (S'd) JOHN L. JEROME,
Notary Public.

Endorsed: 743. In the circuit court. Gwillim R. Gwillim *vs.* John T. Donellan *et al.* Answer. Filed Sep. 3, 1881. (S'd) Edward F. Bishop, clerk. S. O. Walcott, Wm. Story, Chas. H. Tall, att'ys for d'f'ts.

13 And afterwards and on, to wit, the 4th day of November, A. D. 1881, the same being one of the regular judicial days of the October term, A. D. 1881, of said court, present the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial. Verdict. Appeal

GWILLIM R. GWILLIM
vs.
JOHN T. DONNELLAN and WILLIAM R. EVERETT. } For Possesion, etc.

At this day comes the said plaintiff, by Thomas Macon, Esq., his attorney, and the said defendants, by C. H. Toll, Esq., their attorney, also come. And thereupon comes a jury, to wit:

1, Julius Loudoner; 2, George W. Woy; 3, Charles F. Hendin;

4, Charles R. Davis; 5, George Ford; 6, P. C. Johnson, 7, C. C. Gird; 8, William C. Corson; 9, George W. Gildersleeve; 10, E. J. Giddings; 11, Rufus Shute; 12, Lucius Brandt; twelve good and lawful men, and they are duly selected and tried, empanneled and sworn to well and truly try the issues herein joined, and a true verdict render according to the evidence.

And the said jurors having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find the issues herein joined for the said defendant.

14 Wherefore it is considered by the court that the said defendants go hence hereof without day and have and recover of and from the said plaintiff their costs by them in this behalf laid out and expended to be taxed and have executien therefor.

And day until thirty (30) days from this day is allowed said plaintiff in which to file herein his bill of exception reserved by him upon the trial of the issues herein joined.

And afterwards and on, to wit, the 5th day of November, A. D. 1881, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his certain affidavit as to value of property in controversy; and the said affidavit is in words and figures as follows, to wit:

Affidavit.

In the Circuit Court of the United States in and for the District of Colorado.

GWILLIM R. GWILLIM, Plaintiff,
vs.
JOHN T. DONNELLAN, WILLIAM R. EVERETT, Defendants.

Gwillim R. Gwillim, being first duly sworn on his oath, deposes and says: That he is well acquainted with the property in dispute in the above entitled suit, the same being situated in the Upper San Miquel Mining District, in the county of Ouray, and State of

15 Colorado; that during the year last past there was mined and shipped away from said property, by the defendants, to the best of his belief, ore to the value of forty thousand dollars and upwards; said premises are claimed by deponent under the name of the Cambrian Lode, and the same exceed in value ten thousand dollars.

(Signed) GWILLIM R. GWILLIM.

Subscribed and sworn to before me, this 5th Nov'r, A. D. 1881.
[SEAL.] (S'g'd) EDWARD F. BISHOP,
Clerk U. S. Dist. C't.

(Endorsed:) C. C. No. 743. Gwillim R. Gwillim *vs.* John T. Donnellan *et al.* Affidavit of Gwillim R. Gwillim. Filed Nov. 5, 1881. (S'd) Edward F. Bishop, clerk. Wells, Smith & Macon.

And afterwards and on, to wit, the 7th day of November, A. D. 1881, came again the said plaintiff by his attorneys aforesaid and

filed in said court his certain bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond.

16 Know all men by these presents that we, Gwillim R. Gwillim as principal, and James Thomas as surety, are held and firmly bound unto John T. Donnellan and William R. Everett in the ponalty of five hundred dollars, for the payment of which we bind our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals, this 4th day of November, A. D. 1881.

Whereas the said Gwillim R. Gwillim hath prayed a writ of error to the Supreme Court of the United States to review a certain judgment rendered and given on the day of the date hereof in the circuit court of the United States for the district of Colorado, in a certain action then therein pending between the said Gwillim R. Gwillim as plaintiff and the said John T. Donnellan and William R. Everett as defendants. Now, if the said Gwillim R. Gwillim shall prosecute his said writ of error to effect and answer all costs and damages in case he shall fail to make his plea good, then his obligation to be void; else in full force and virtue.

(Signed) GWILLIM R. GWILLIM. [L. S.]
JAMES THOMAS. [L. S.]

Witness to signature of James Thomas:
(S'd) LOUIS ANFENGER.

Approved Nov. 7, 1881. (S'd) MOSES HALLETT,
Dist. Judge.

17 DISTRICT AND STATE OF COLORADO, } ss:
Arapahoe County }

James Thomas, being first duly sworn, saith on oath that he resides at the city of Denver in said district, and hath resided there for more than eight years last past, and that he is possessed of and is the owner of personal property to the value of two thousand dollars at least, over and above all deponent's just debts and liabilities, and after excluding and allowing for property exempt from execution. Said property consists of a stock of jewelry, watches, and clocks, which is situate at deponent's place of business, No. 439 Larimer street, in said city of Denver. The stock is worth between thirty-five hundred and four thousand dollars at a reasonable estimate. Deponent's debts do not exceed eight hundred dollars in all, and deponent hath about three hundred and fifty dollars in money applicable to said indebtedness.

(Signed) JAMES THOMAS.

Subscribed and sworn to before me, this 5th day of November, A. D. 1881.

[SEAL] (S'g'd) LOUIS ANFINGER,
Notary Public.

(Endorsed:) C. C. No. 743. Gwillim R. Gwillim *vs.* John T. Donnellan, William R. Everett. Bond in error. Filed Nov. 7, 1881. (S'd) Edward F. Bishop, clerk.

17½ And the said writ of error is hereto attached in words and figures as follows, to wit:

18 *Writ of Error.*

The United States of America.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Gwillim R. Gwillim as plaintiff, and John T. Donnellan and William R. Everett as defendants, manifest error hath happened, to the great damage of the said Gwillim, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of November, in the year of our Lord one thousand eight hundered and eighty-one, and of the Independence of the United States the 106 year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

19 *Return.*

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and seal of said circuit court, at Denver, in said district, this 15th day of February, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk.*
By WM. E. ROGERS, *Deputy Clerk.*

[Endorsed:] Gen. No. 743. Circuit court of the United States. Gwillim R. Gwillim, plaintiff in error, *vs.* John T. Donnellan, William R. Everett. Writ of error to supreme court, U. S. district of Colorado. Filed in circuit court of the U. S., this 7 day of Nov., A. D. 1881. Edward F. Bishop, clerk.

And the said citation is hereto attached, in words and figures as follows, to wit:

20 *Citation. U. S. Circuit Court.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to John T. Donnellan, William R. Everett, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, on the 2d Monday of —— next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Gwillim R. Gwillim is plaintiff in error, and you, the said John T. Donnellan and William R. Everett, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 7th day of November, in the year of our Lord one thousand eight hundred and eighty-one.

MOSES HALLETT, *Judge.*

Rec'd a copy of the above Nov. 7th, 1881.
CHARLES H. TNLL,
Def's' Att'y.

21 *Proof of Service.*

THE UNITED STATES OF AMERICA, *District of Colorado.* } *ss:*

On this seventh day of November, A. D. 1881, before me, the subscriber, clerk of the circuit court of the United States for the district of Colorado, personally comes Issac Thomas, and makes oath that he delivered a true copy of the within citation to Charles H. Toll, Esq., the attorney of the within named defendants, John T. Donnellan and William R. Everett.

ISAAC THOMAS.

Sworn to and subscribed before me, this 7th day of November, 1881.

EDWARD T. BISHOP, *Clerk.*
By WM. E. ROGERS, *Deputy Clerk.*

(Endorsed:) Gen. No. 743. Circuit court of the United States district of Colorado. Gwillim R. Gwillim, plaintiff in error, *vs.* John T. Donnellan, William R. Everett, defendants in error. Citation. Filed in circuit court of the U. S., this 7th day of Nov'r, A. D. 1881. Edward F. Bishop, clerk, by William E. Rogers, deputy clerk.

22 And afterwards and on to wit, the 28th day of November, A. D. 1881, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his certain bill of exceptions; and the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

THE UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court.

GWILLIM R. GWILLIM, Plaintiff,

vs.

JOHN T. DONNELLAN, WILLIAM R. EVERETT, Defendants.

Be it remembered, that at the October term, A. D. 1881, of the said circuit court, the issues herein joined came on to be tried before his honor Moses Hallett, district judge of said district, then in said court presiding, and a jury.

Whereupon, Thomas Macon, Esq., counsel for plaintiff, stated to the court that he would prove on behalf of said plaintiff, to maintain the said issues on his part, that one Isaac Thomas, on or about the 16th day of May, 1878, discovered on the public domain of the United States, and within the limits of the premises described in the complaint herein, a vein or lode of rock in place bearing gold
23 and silver, and sunk a shaft upon the said vein, within the limits of the premises claimed and described in the complaint, to the depth of ten feet or more, at the lowest point of the rim of said shaft and to a well defined crevice, and that said Thomas, about that same time, had located the said premises under the name of the Cambrian lode, and had performed all acts required by law in order to the valid location thereof as a lode mining claim within the limits of the public domain, and performed all said acts within the time allowed by law therefor. That plaintiff derived title from said Isaac Thomas.

Plaintiff's counsel stated to the jury further that after the location of the claim of said Thomas, and before his conveyance to plaintiff, one John Fallon had, without any adverse claim interposed by the said Thomas, or any one in his behalf, obtained patent from the United States for premise, including therein that part of the claim of said Thomas wherein was situated the discovery shaft sunk by said Thomas, and that before any new workings or developments done or made by said Thomas upon any part of said claim, the defendants had entered into that part of the claim of said Thomas not included in the patent aforesaid, and located the same as a minining claim in the public domain.

The plaintiff having given evidence tending to prove the
24 matters aforesaid, the court, without hearing the defendants' evidence, ruled that inasmuch as that part of the claim of said Thomas, wherein was situated his discovery shaft, had been patented to a third person, that the plaintiff, upon the case stated by his counsel, and the evidence given, was not entitled to recover any part of the premises described in the complaint, and instructed the jury to find the said issues for the defendant; and to this ruling and opinion of the court, the plaintiff then and there in open court excepted.

Wherefore the jury aforesaid, upon the said instruction and charge of the court, returned their verdict in favor of the said defendants, and judgment was given thereon accordingly.

And because these matters do not appear by the record herein, the plaintiff brings this his bill of exceptions and prays his honor, the judge of this court, to sign and seal the same and make it part of the record herein, which is done accordingly.

(Signed) MOSES HALLETT. [L. S.]

This bill of exceptions having been presented to me on the 28th of November, A. D. 1881, and now first settled and allowed, let the same be filed by the clerk as of said 28th November, A. D. 1881.

(Signed) MOSES HALLETT.

Denver, December 16th, A. D. 1881.

25 Endorsed: C. C. No. 743. Gwillim R. Gwillim *vs.* John T. Donnellan *et al.* Bill of exceptions. Filed November 28, 1881. (S'd) Edward F. Bishop, clerk.

UNITED STATES OF AMERICA, } *ss*:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the complaint, demurrer, answer, affidavit as to value, bond, writ of error, citation and bill of complaint, and all orders of court heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Gwillim R. Gwillim was plaintiff, and John T. Donnellan *et al.* are defendants, as fully and completely as the same still remains on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fourteenth day of February, A. D. 1882.

[SEAL.] EDWARD F. BISHOP, *Clerk*,
By WM. E. ROGERS, *Deputy Clerk*.

Costs of transcript:

50 fol., @ 10c	$5 00
Certificate	35
	$5 35 Paid by pl'ff.

26 *Joinder in Error.*

Supreme Court of the United States. Joinder in Error.

GWILLIM R. GWILLIM, Plaintiff in Error,

v.

JOHN T. DONELLAN and WILLIAM R. EVERETT, Defendants in Error.

And afterwards, to wit, on the first Monday of the October term, in the year of our Lord one thousand eight hundred and eighty-two, the said John T. Donnellan and William R. Everett, by Charles H. Toll, their attorney, freely come here into court and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and they pray that said supreme court of judicature, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid and form aforesaid given may be in all things affirmed, etc.

CHARLES H. TOLL,
Att'y for Def'ts in Error.

27 [Endorsed:] Supreme Court of the United States. Gwillim R. Gwillim, pl'ff in error, *vs.* John T. Donnellan *et al.*, def'ts in error. Joinder in error. Charles H. Toll, att'y for def'ts in error. Denver, Colorado. Supreme Court U. S., 1882, October term. No. 858. Gwillim R. Gwillim, pl'ff in error, *vs.* John T. Donnellan & *al.* Joinder in error. Filed 9th October, 1882.

Endorsed on cover: Colorado C. C. U. S. No. 222. Gwillim R. Gwillim, plaintiff in error, *vs.* John F. Donnellan and William R. Everett. Filed 7th June, 1882.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1884.

GWILLIM R. GWILLIM,
Plaintiff in Error.
vs.
JOHN F. DONNELAN ET ALS.,
Defendants in Error.

No. 222.

BRIEF FOR PLAINTIFF IN ERROR.

E. T. WELLS,
for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM. A. D 1884.

GWILLIM R. GWILLIM,
Plaintiff in Error.
vs.
JOHN F. DONNELAN ET ALS.,
Defendants in Error.

No. 222.

BRIEF FOR PLAINTIFF IN ERROR.

FACTS OF THE CASE.

Isaac Thomas brought his action against the defendants in error to recover a mining claim called the Cambrian lode, situate in the country of Ouray and state of Colorado (printed record, p. 1.) The plaintiff in error was substituted for Thomas, and removed his cause to the circuit court. The premises are described as being fifteen hundred feet in

length along the vein of said lode, with the surface ground three hundred and fifty feet in width (R. p. 1.) The defendants answered denying all the allegations of the complaint (R. pp. 4, 5.) A jury being empanneled, and having heard the evidence of the plaintiff, were directed by the court to find for the defendants, and judgment was given accordingly (R. p. 7.) The plaintiff gave evidence tending to show that Isaac Thomas, on the 16th day of May, 1878, discovered in the public domain, and within the premises described in the complaint, a vein of rock in place bearing gold and silver; and sunk a shaft to the depth of ten feet or more, at the lowest point of the rim of the shaft, to a well defined crevice, and located the premises under the name of the Cambrian lode, and performed all the acts required by law to a valid location. Plaintiff derived title under said Thomas. It appeared that after the location of the claim by the said Thomas, and before his conveyance to the plaintiff, one Fallon instituted proceedings to obtain a patent from the United States for another claim, including that part of Thomas's claim whereon was situated the discovery shaft sunk by said Thomas; that no adverse claim was interposed, and Fallon accordingly entered his claim and obtained a patent therefor; and before any new workings or developments done or made by said Thomas upon any part of his claim, not included in this patent, the defendants

entered therein and located the same as a mining claim in the public domain.

The court thereupon ruled that inasmuch as that part of the claim of Thomas whereon was situated his discovery shaft had been patented to a third person, the plaintiff was not entitled to recover any part of the premises, and instructed the jury to find for the defendant.

This instruction is assigned for error.

THE LAW OF THE CASE.

The acts of congress, Rev. Stat. Title 32, ch. 6, authorize all citizens of the United States, and those who have declared their intention to become such, to explore in the public domain for deposits of gold and silver and other valuable metals and minerals, and to locate, segregate and take to themselves, and to occupy, possess and enjoy claims thereon under certain conditions and restrictions. Other conditions are added by the local statutes.

Inasmuch as all these conditions are shown to have been complied with by the locator, Thomas, it becomes unnecessary to specify or consider them. Thomas, according to the case made, had a perfect location. His title to the premises within the limits of his claim was as perfect and absolute, so long as he should comply with the requirements of the acts of congress in respect to annual labor, as if patent had already

emanated; and this right and his title extended through the whole limits of his location. It was not confined to the location shaft, or to that part of the claim in the neighborhood thereof. It was fifteen hundred feet in length and three hundred feet in width. It included the whole surface ground and the vein to the center of the earth, with all its dips, spurs and angles, side veins and feeders.

But according to the ruling of the court below, the loss of the discovery shaft by the omission of Thomas to interpose his adverse claim to the application of Fallon for a patent, destroyed his right in respect to the whole claim.

This is not the law. His rights in the other parts of the claim did not at all depend upon his retaining title to that portion of the claim wherein was situated the discovery shaft. He might grant away that portion of the claim without impairing his rights in the residue. This has been expressly decided by the same learned justice who gave judgment in this case in the court below :

> Little Pittsburgh Co. vs. Aimee Co. (17 Fed. Rep. 57.)

It will be seen by examination of that case that the facts are precisely like those here involved. The bounds of the Little Pittsburgh claim included the discovery shaft of the Winnemucca. The owners of the Little Pittsburgh applied for patent and were

opposed by the owners of the Winnemucca, but this adverse claim was withdrawn and entry of the Little Pittsburgh followed.

His Honor states the position of the defendants to be that "by the withdrawal of the adverse claim the Winnemucca parties abandoned their claim entirely," and thereupon he repels this contention. "I do not see," he declares, "upon what principle such a conclusion can rest. After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him. * * Whether the Winnemucca parties yielded voluntarily to the Little Pitsburgh people or made sale to them or in what way they disposed of their interest, is not stated. But I do not think that can be material."

It is respectfully submitted that this authority, the only one which we have seen upon the question, is a refutation of the erroneous doctrine announced in the case at bar.

E. T. WELLS,
for Plaintiff in Error.

COLLINS, PRINTER, 404 CHAMPA, DENVER.

No. 222.

115-45

IN THE

Supreme Court of the United States,

October Term, A. D. 1884.

GWILLIM R. GWILLIM,
Plaintiff in Error,

vs.

JOHN T. DONNELLAN, *et al.*,
Defendants in Error.

PHILADELPHIA BAR ASSOCIATION

Writ of Error to Circuit Court of the United States for the District of Colorado.

Brief for Defendants in Error.

EDWARD O. WOLCOTT,
CHARLES H. TOLL,
For Defendants in Error.

KELLY, PRINTER, DENVER.

IN THE

Supreme Court of the United States,

October Term, A. D. 1884.

GWILLIM R. GWILLIM,
Plaintiff in Error,
vs.
JOHN T. DONNELLAN, *et al.*,
Defendants in Error.
No. 222.

Brief for Defendants in Error.

Facts of the Case.

It is conceded that the statement of facts contained in the brief of the plaintiff in error is in accordance with the record, with this exception—that the record does not show that the proceedings instituted by Fallon to obtain a patent from the United States for his lode, were instituted subsequent to the location of the Cambrian lode by Thomas, the grantor of plaintiff in error. As to the time such proceedings were instituted the record is silent, but it discloses (Record Fol. 23), that "after the location of the claim of said Thomas, and before his conveyance to plaintiff, one John Fallon, had without any adverse claim interposed by the said Thomas, or anyone in his behalf, obtained patent from the United States for premises, including therein that part of the claim of said Thomas wherein was situated the discovery shaft sunk by said Thomas, and that before any new workings or developments done or made by said Thomas upon any part of said claim the defendants had entered into that part of the claim of said Thomas not in-

cluded in the patent aforesaid, and located the same as a mining claim in the public domain."

The date of *issuance* of Fallon's patent can only be determined from the record as being subsequent to the location of plaintiff's Cambrian lode, May 16th, 1878 (Rec. Fol. 22), and prior to the location by defendants of their Mendota lode November 19th, 1878, (Rec. Fol. 10).

It does not appear from the record that any work or improvements are claimed to have been done, or made, at any time upon the mining claim of plaintiff in error, except such as were made prior to the issuance of patent to Fallon. Nor does it appear that any work was done or improvements made upon the Cambrian claim, except such as were requisite to the *location* of such claim.

It does not appear from the record that plaintiff in error, or his grantor, Thomas, ever did anything more than was essential to the mere *location* of the Cambrian lode, and it is not shown that an annual assessment, or labor to the amount of one hundred dollars, had ever been done by plaintiff in error, or his grantor, upon such lode since its location, in May, 1878, up to the time of trial in the Court below, in 1881, or that plaintiff in error, or his grantor, had in any respect complied with the requirements of the Federal and local laws, applicable to a continuance of the right of possession of a mining claim, subsequent to November 19, 1878.

Nor does it appear, from the record, that plaintiff in error or his grantor were, at any time, forcibly excluded from the premises in dispute; or in any manner prevented, by the defendants, from performing the annual labor essential to a continuance of plaintiff's claim of title under his Cambrian location.

THE LAW OF THE CASE.

Assuming the location of the Cambrian lode, to have been made in accordance with the provisions of the laws of the

United States, and of the State of Colorado, relating to the location of lode mining claims, it was incumbent upon the plaintiff in error to show, upon the trial below, a compliance with §2324, U. S. R. S., in respect to the performance of annual assessments thereon, or some valid excuse for non performance thereof, and in the absence of evidence of such assessments, it must be assumed that no annual assessment was ever done upon the Cambrian claim of plaintiff since its location in May, 1878; or prior to the commencement of this action in the court below in 1881.

In the absence of any evidence tending to show upon the trial below that the plaintiff was in actual possession of any portion of the premises in dispute, at the time (in the year 1881) in which ouster by the defendants was alleged in the complaint (R., fol. 3), and in the absence of any evidence tending to show compliance with the statutory requirements as to the annual performance of labor upon the claim, during the period succeeding the location in May, 1878, it cannot be assumed that the plaintiff had either constructive or actual possession in the year 1881.

Without showing such possession at the time of the alleged ouster by defendants, the plaintiff below established no title to the premises, notwithstanding his Cambrian location in 1878 may have been regular and valid at the time it was made.

Belk vs. Meagher, 104, U. S., 279, (*Vide*, p. 287.)

But it is contended by the defendants in error that Thomas relinquished and abandoned all rights as a locator and claimant of mineral lands upon the public domain, when he permitted Fallon, as the owner of a conflicting location, to obtain a patent therefor, granting to him the absolute title to the only premises on which Thomas claimed to have made his discovery and his location, and embracing the only premises of which Thomas appears ever to have had the actual possession, and the only premises in which he claims to have discovered a vein or lode.

The voluntary action of Thomas in permitting Fallon to obtain a patent including the discovery shaft of the Cambrian claim, and all the premises upon which he or his grantee, the plaintiff in error, has at any time performed any labor or made any improvements, was an absolute and conclusive admission that his location was made subsequent to Fallon's conflicting location, and was not made up on unoccupied lands, and he cannot, in this case, now be heard to claim that his discovery and location of the Cambrian was made upon the unappropriated public domain.

If the Cambrian were located upon the public domain, Thomas waived his priority.

Wright vs. Tabor, Copps Land Owner, Vol. 10, pg., (Decision by Secretary Teller.)

"The silence of the locator is a waivor of his priority."

The Eureka Case, 4 Sawyer, 302, (*vide* pg. 318.)

The failure of Thomas to adverse the application of Fallon, unquestionably constituted an abandonment of all possessory rights to the premises included within Fallon's claim, and embracing the Cambrian discovery, and location and improvements, if we can accept the language employed in Mallett vs. Uncle Sam Co., 1 Nev., 188, as defining the term abandonment when applied to mining claims, viz.: "the relinquishment of a right, the giving up of something to which we are entitled."

It seems clear that Thomas' failure to adverse Fallon's application, was not merely a conclusive admission that the inception of his title, was subsequent to that of Fallon, but such failure constituted an unequivocal and absolute abandonment to the United States of all title to all the premises upon which he had made his location and sunk his discovery shaft.

Unquestionably this was a complete relinquishment to the United States, so far as his claim extended to the premises included in Fallon's conflicting location. And as the

premises which he thus abandoned to the general government, and through it to its grantee, included *all* the premises upon which he had done the only acts which conferred upon him a possessory right to any part of the public domain, he was thereby estopped from claiming any title to any portion of the Cambrian, not embraced within Fallon's patent.

Thenceforth his rights were no greater and differed in no respect from what they would have been, had he originally entered within the limits of a prior or patented claim, and discovering a lode therein, had attempted to locate it and excavated a discovery shaft thereon.

Such discovery and location would have possessed no validity, and conferred no title to any portion of his claim even though it extended beyond the boundaries of the earlier location, and his action would have been only that of a trespasser.

Atkins vs. Hendree, 1 Idaho, 107.

Golden Terra Mg. Co. vs. Mahler, 4 Morrison's Mining Reports, 390.

Lebanon Mg. Co. vs. Con. Rep. Mg. Co., 6 Colo., 371.

Armstrong vs. Lower, 6 Colo., 393.

The discovery and location of a mineral vein upon the public domain—the sinking of a shaft thereon as required by the statutes of Colorado—constituted the fundamental origin of any rights which Thomas acquired to any portion of the premises within the boundaries of his location, and when he abandoned his discovery-shaft and all the premises upon which he had done whatever had conferred upon him any possessory right, he abandoned and relinquished any title which he may have enjoyed up to that time.

The position assumed by the plaintiff in error before this Court, leads to the inevitable conclusion that a claimant may obtain a patent for a lode claim 1500 feet in length, without having made any discovery of mineral within its

boundaries, and without having made any development therein, provided he can show, upon premises to which he can make no claim and obtain no title, and not included within his application, performance of those acts which are required by the statutes of the United States and by the local laws, to have been done upon the premises for which he seeks patent.

This position cannot be seriously maintained, and is refuted by the views expressed in analogous cases.

Zollars et al. vs. Evans, 2 McCrary, 39.

Van Zandt vs. Argentine Co., *4 Morrison's Mining Reports, 441.*

Jupiter Mg. Co. vs. Bodie Mg. Co., 7 Sawyer, 96.

North Noonday Mg. Co. vs. Orient Mg. Co., 6 Sawyer, 299.

Leadville Mg. Co. vs. Fitzgerald et al., 4 Morrison's Mining Reports, 380.

On the trial below the burden was upon the plaintiff in error to show that the lode, upon which the Cambrian was located, extended into and had been disclosed within the premises in dispute; but the record contains no indication that such was the fact.

So far as the record goes it discloses only the existence, discovery and location of a mineral lode upon territory which has been patented to a third party, and to which plaintiff can make no claim.

It cannot be assumed that the lode located by the defendants as the Mendota, is the same lode which exists within the location for which Fallon has a patent, and it can not be assumed that the lode which may have been discovered by Thomas extends beyond that portion of the Cambrian to which he voluntarily abandoned all claim—all title, and which, having been absorbed under Fallon's patent without Thomas protesting, is conclusively presumed to

have belonged to Fallon under an earlier and superior appropriation of the public domain.

The only case relied upon by plaintiff in error—

Little Pittsburg Co. vs. Aimee Co., 17 Fed. Rep., 57,

will, upon examination, be found inapplicable to the case at bar.

The distinction between the cases rests in the fact that in the Little Pittsburg case, the owners of the Winnemucca, after adversing the application of the Little Pittsburg, transferred their title to the Little Pittsburg owners.

The acceptance by the Little Pittsburg of a transfer of the title of the Winnemucca to the territory in controversy, constituted in itself an acknowledgement of the earlier and superior title of the Winnemucca. Instead of waiving all claims to the ground included in the conflicting claims, by failure to adverse the Little Pittsburg, the owners of the Winnemucca asserted their earlier and superior location, and secured its recognition by the applicants for the Little Pittsburg. The distinction observed by Judge Hallett is clearly shown by the concluding paragraph of his opinion:

"It has been decided, it is true, in the Supreme Court of this State, and in this Court also, that a location may not be made by a discovery shaft upon another claim which has been previously located, and which is a valid location, but that doctrine has nothing to do with the point in controversy here. For all that appears, the Winnemucca may have been the better location, and it may have been sold to the Little Pittsburg parties or disposed of in some way. The mere fact that a part of it was *transferred* to the Little Pittsburg parties is not enough to defeat the right of the locators to other portions which were not sold, disposed of or surrendered."

In another opinion, that given by the same distinguished justice, in the Colorado Central case, reported in

the 3d Ed. of Morrison's Mining Rights, he uses the following language: "Assuming that these are lodes crossing each other, in the manner indicated by the locations "the question arises: What right has each of the parties "within the lines of both locations? And here we must recall the fact that plaintiff's grantor, although his lode was "not first discovered, was the first to apply for and obtain a "patent.

"In that way he secured the exclusive right to "the surface ground described in the patent, and all "lodes having their out crop in that domain, which would "by the terms of the act pass with the grant. If the proceedings to obtain the patent were regular and without "fraud in the patentee, that instrument is, in his hands, and "in the hands of his grantee, full evidence of title as "against all antecedent claims to the same property. By "the act respecting mines (R. S. § 2325) notice for patent is "required to be given to adverse claimants by posting over "the claim and through the columns of a newspaper, and "opportunity is give to such claimants to contest with the "appellant the title to the property. (§ 2326.) The object "of these provisions is to secure a settlement and adjustment of all controversies respecting the property, in order "that the patent may be issued to the rightful owner; and "it is declared in the act that if no adverse claim shall be "filed within the time specified for giving notice, it shall be "assumed that no such claim exists; without such declaration the meaning of the statute would be clear enough, "for when it is required that notice shall be given, and notice is given accordingly, no one having an interest in the "subject can be allowed to disregard it.

"With that provision there is no room for discussion as "to the conclusive effect of a patent on all questions affecting the title which are pending at the time it is issued."

* * * * * "This rule extends as

"well to the date of the discovery and location of the "claim as to other matters affecting the title of two "adverse locations made, that which is prior in time "is undoubtedly prior in right. But this must be shown at "the time and in the manner pointed out, or the right will "be waived. And after patent, the patentee will be regarded "as having the elder as well as the better title in all "respects."

These views are supported by those expressed in

The Eureka Case, 4th Sawyer.

Wolfly vs. Lebanon Co., 4th Colo.

If in fact, Thomas had the earlier discovery, he waived all claims to an earlier and superior location when he failed to adverse Fallon's application; and the court below properly held that he could not, upon the trial of this case, establish an earlier location in the face of the facts conclusively established by the issuance of Fallon's patent; nor controvert the conclusive presumption resulting from his failure to adverse Fallon's application for the premises, which included the Cambrian discovery and location and the origin of all title to any part of such claim.

The presumption being conclusive against Thomas that Fallon's location was the earlier, he could not establish, in the court below, that his location was made upon the unappropriated domain, and the consideration of this case must be controlled by the views expressed in

Belk vs. Meagher, 104 U. S., 279.

Armstrong vs. Lower, 6 Colo., 393.

EDWARD O. WOLCOTT,
CHARLES H. TOLL,

For Defendants in Error.

115-45

FILED.
MAR 31 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1884.

GWILLIM R. GWILLIM, *Plaintiff in Error,*

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No. 222.

PHILADELPHIA BAR ASSOCIATION

Supplemental Brief for Defendants in Error.

CHARLES H. TOLL AND
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R. O. Polkinhorn & Son, Printers

Supreme Court of the United States.

OCTOBER TERM, 1884.

GWILLIM R. GWILLIM, *Plaintiff in Error*,

vs.

JOHN F. DONELLAN AND WILLIAM R. EVERETT, *Defendants in Error.*

No. 222.

Supplemental Brief for Defendants in Error.

This is a writ of error to the Circuit Court of the United States for the District of Colorado.

The action was instituted to recover the possession of a mining claim in Colorado, and also for damages for the detention, and was originally brought in a State court by one Thomas, a citizen of that State. Pending the action in the State court, as the complaint in the Circuit Court shows, Thomas "conveyed the said premises, damages and costs," to the plaintiff in error. Thereupon the plaintiff in error was substituted in that cause as plaintiff instead of Thomas, and he then exhibited his complaint in the Circuit Court of the United States for the District of Colorado, in which he states that he, "at the date of the institution of the said suit, was, and still is, a subject of Victoria, Queen of Great Britain and Ireland."

Here we have a man challenging in the courts of this country the right of citizens of the United States who have complied with all the requirements of the laws to hold and possess a mining claim, and he is confessedly an alien and a subject of Great Britain. His right to hold or recover any interest in the premises depends upon his statutory right to locate, occupy, and demand a patent for such a mining claim, being a part of the public domain.

It is to the fact of alienage in the case to which we desire, by this supplemental brief, to invite the attention of the Court, and we submit this proposition of law in reference thereto:

An alien, who has not declared his intention to become a citizen, cannot locate or hold possession of a mining claim, a part of the public domain of the United States, and he cannot take any step intermediate between the location of such claim and the delivery of the patent therefor.

In the case of *Thompson* vs. *England*, (1 Hawks, 137,) the law required all persons, who undertook to make an entry of public lands, to take "the oath of allegiance and abjuration" before making such entry. An alien attempted to make an entry, and for the reason that he could not take the required oath, afterward conveyed his interest to another. The court held the entry invalid, and said:

> "I am of opinion, that if he was not qualified to make entries and hold titles to land himself, he could not do it by the agency of another person. The sound policy of the law forbade it. It was entirely against the spirit and meaning of the law."
>
> (See, also, *Mine* vs. *Adams*, 3 Wall., Jr., 20, 29–30; *McDevitt's Case*, Rep. Gen. Land Office, 1877, p. 93; *Coates Case*, *ibid*, 1876, p. 83.)

This doctrine has been asserted by the Supreme Court of Nevada in the case of *The Golden Fleece Co.* vs. *Cable Con.*

Co., (12 Nev., 312,) and it is the rule established and prevailing in the executive departments of the Government. The question arose in the General Land Office in 1875, and was from there referred to the Department of Justice for the opinion of the Attorney General. Mr. Solicitor General Phillips rendered an opinion in accordance with our proposition, as above stated.

(15 Att'y Gen'ls Opin., 29.)

Should the conclusions relied upon above receive the sanction of this Court, it would end the litigation and necessarily result in dismissing the cause, even if this Court should be of opinion that the directions of the trial court to the jury were erroneous.

As an abstract proposition of national economy, it would be a matter of amazement if the Government of the United States should donate the rich mineral lands appertaining to the public domain to foreigners and citizens on equal terms. But an examination of the statutes on the subject will doubtless convince the Court that no other conclusion is admissible than that which is herein contended for. The rights of the plaintiff in error are purely statutory, and they cannot be extended in his behalf beyond what a just interpretation of the language which the law-making power has used will justify.

Hall vs. *Russell*, 101 U. S., 511.

These statutes authorizing the location, occupation, and purchase of the mineral-bearing lands of the public domain provide, among other things, that—

> "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found

to *occupation and purchase by citizens of the United States and those who have declared their intention to become such.*"

R. S., Sec. 2319.

Section 2325 prescribes the manner of proceeding in order to obtain a patent for a mining claim, properly located, and provides that—

> "Any person * * * *authorized to locate a claim* under this chapter, having claimed and located a piece of land for such purposes, who has * * complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance." &c. &c.

And if no adverse claims shall have been filed with the register

> "It shall be assumed that the applicant is entitled to a patent," &c., &c.

Section 2326 regulates and prescribes the proceedings which are to be had upon the presentation of an "adverse claim." The person who interposes the adverse claim is required to commence proceedings, within thirty days, in a court of competent jurisdiction, to determine the question of the right of possession, and to prosecute his cause to final judgment with reasonable diligence. After judgment has been rendered it is made effectual by the statute in the fol-

> "After such judgment shall have been rendered, the party entitled to the possession of the claim or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the Register of the Land Office. * * * Whereupon the whole proceedings and the judgment-roll shall be certified by the Register to the Commissioner of the General Land Office, and *a patent shall issue thereon for*

> *the claim*, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." (R. S. 2326.)

Section 2322 relates to the possession of the claim after location, and provides that:

> "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs or assigns, * * * so long as they comply with the laws of the United States * * * governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations."

The most conspicuous feature of the policy of the Government disclosed by those statutes is the exclusion of aliens from participating in its bounty. The privileges and bounty granted by the law are confined to "citizens of the United States and those who have declared their intention to become such." The whole theory of the system of laws relating to public lands is at war with the idea that a foreigner may directly or indirectly secure any advantage from these grants of high privileges relating to the mineral-bearing public lands, prior to the time when a patent shall have been regularly issued therefor by the Government to a citizen. When the patent has been delivered, the land then becomes alienable to *any person* by the very terms of the Statute. Section 2326 concludes with these words:

> "Nothing herein contained shall be construed to prevent the alienation of the *title conveyed by patent* for a mining claim *to any person whatsoever*."

These provisions of the Statute, as to alienation, can operate upon no persons except aliens who have not declared their intention to become citizens. There is no class of

persons to whom a claim cannot be assigned prior to the issuing of the patent, except it be aliens excluded by the language of section 2319, and if they be not incapable of taking located claims before patent issued, then these concluding words of section 2326 are meaningless.

The language of section 2322 does not militate against this view of the Statute. That section declares that locators, "their heirs *and assigns*," shall have the exclusive right of possession of the real estate included within the lines of the location, so long as they shall comply with the requirements of the laws and regulations. But if it be true that an alien can take no step towards bringing up the claim to the condition in which it must be to warrant the issuing and delivery of a patent, the word "assigns" is limited to such persons as are citizens or such as have declared their intention to become such.

If it be true that an alien may purchase a claim which has been partially located by a citizen, the question naturally arises, how many of the statutory or regulation requirements must have been completed before he can come in? May the alien take up and carry on those proceedings necessarily preliminary to the patent, immediately after the first blow with the pick, or must he wait until the shaft has been sunk, the stakes driven, and the notice posted? If he can intervene after the shaft has been sunk, why not before? Or if he can secure rights in the claim, which must be recognized by the law, immediately after the first stroke with the pick, why may he not take the initiatory steps, and make and utilize the discovery? If the alien can secure a vested interest by purchase in such a claim at any time prior to the delivery of the patent, by virtue of which he can perform any of the acts which are required by law to precede the patent, it seems difficult to point out at what particular stage of the work he may thus interpose. It will be still more difficult to explain

why he cannot perform all the acts required by law to be done, if he can legally perform any one of them.

This objection was taken by the defendants in error by a demurrer to the complainant filed in the court below. The record does not inform us as to the disposition made of this demurrer, but we are informed by counsel that the learned judge holding the Circuit Court overruled the demurrer.

A judgment in favor of the plaintiff for possession of the premises in this cause would be an idle ceremony. Section 2326, of the Revised Statutes, before cited, which points out the course to to be pursued to enforce the judgment and give it effect, requires that the whole proceedings had in the office of the register of the land office, together with the judgment roll, shall be certified by the register to the Commissioner of the General Land Office, and that a patent shall issue thereon. But this patent must be such a patent as is called for by section 2325, and authorized to issue for "*any land claimed and located for valuable deposits.*" Such patents are authorized to issue to such persons, associations, or corporations only as are by law "*authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes,*" &c.; aliens who have not declared their intention of becoming citizens being, by the express language of the statute, excluded from the class of persons who may avail themselves of the benefits of this bounty of the Government "*and locate a claim,*" it seems to be an irresistible conclusion that a valid patent cannot be issued to an alien under the provisions of this statute.

This being a sound deduction from the language of the Statutes, it follows logically that the Circuit Court is without jurisdiction to render any judgment for the possession of this mining claim in dispute, in favor of this plaintiff.

It is no answer to this argument to say that the patent may issue to the person who originally located the claim, and that by the operation of law such a title will inure to